

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | : | |
| | : | |
| -v- | : | 98cr778 (DLC) |
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| CHARLES MICHAEL KEE, | : | <u>ORDER</u> |
| | : | |
| Defendant. | : | |
| | : | |
| -----X | | |

DENISE COTE, District Judge:

On June 30, 2000, Charles Michael Kee pleaded guilty to, inter alia, using a firearm during the commission of a crime of violence, in violation of Title 18, United States Code, § 924(c). The sole predicate crime underlying his § 924(c) conviction was conspiracy to commit murder, in violation of New York state law. On December 7, 2000, Kee was sentenced to a total of 480 months' imprisonment for his various convictions. Sixty months of his 480 month sentence stemmed from his § 924(c) conviction. Between 2001 and 2016, Kee filed five petitions to vacate, set aside, or correct his conviction pursuant to Title 28, United States Code, Section 2255, all of which were denied.

On June 23, 2016, Kee filed a sixth § 2255 petition. In that petition, Kee principally argued that his § 924(c) conviction was no longer valid after the Supreme Court's decision in Johnson v. United States, 576 U.S. 591 (2015). On July 13, 2016, this Court transferred the petition to the United

States Court of Appeals for the Second Circuit for determination of whether his successive petition could proceed, pursuant to 28 U.S.C. § 2255(h) and 28 U.S.C. § 2244(b)(3)(A). The Second Circuit then stayed consideration of his petition for several years as the United States Supreme Court and the Second Circuit considered other cases raising similar legal issues. On March 11, 2020, the Second Circuit lifted the stay, granted Kee leave to file a successive § 2255 petition, and transferred the case to this Court. On October 20, 2020, counsel was appointed to assist Kee in making a § 2255 petition.

On February 5, 2021, Kee filed his § 2255 petition. In that petition, Kee argued that his § 924(c) conviction must be vacated because the sole predicate offense underlying that conviction -- conspiracy to commit murder -- does not qualify as a crime of violence after the Supreme Court's decision in United States v. Davis, 139 S.Ct. 2319 (2019), and the Second Circuit's decision in United States v. Barrett, 937 F.3d 126 (2d Cir. 2019). On April 25, the Government consented to vacatur of Kee's § 924(c) conviction in light of Davis. Accordingly, it is hereby

ORDERED that Kee's June 23, 2016 petition to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 is granted. Kee's June 30, 2000 conviction for using a firearm in


furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) is vacated.

IT IS FURTHER ORDERED that Kee shall be resentenced on his remaining counts of conviction on **June 25, 2021** at 11 am.

IT IS FURTHER ORDERED that any defense submission regarding resentencing shall be due **June 11** and the Government's reply shall be due **June 18**.

IT IS FURTHER ORDERED that counsel for the defendant shall, by **May 17**, advise the Court of whether the defendant agrees to waive his physical presence at the resentencing and appear via videoconference or if he prefers to be present in court for resentencing.

Dated: New York, New York
April 26, 2021



DENISE COTE
United States District Judge